



**Chege v Muiruri (Miscellaneous Civil Application 382 of 2016)  
[2024] KEHC 8181 (KLR) (Civ) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8181 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION 382 OF 2016  
CW MEOLI, J  
JUNE 27, 2024**

**BETWEEN**

**JOHN KIMANI CHEGE ..... APPLICANT**

**AND**

**WILLIAM GATEI MUIRURI ..... RESPONDENT**

**RULING**

1. For determination is the application dated February 21, 2024 by John Kimani Chege (hereafter the Applicant) primarily seeking that the decision of the taxing officer in respect of the Party and Party Bill of Costs dated 05.09.2018 in the sum of Kshs. 160,190/- be reviewed and or set aside; that the Court be pleased to substitute the impugned decision with its own or remit back the matter to the taxing officer for re-assessment. The application is expressed to be brought *inter alia* under paragraph 11 of the [Advocates Remuneration Order](#) (ARO) and section 1A, 1B & 3A of the [Civil Procedure Act](#) (CPA), and is based on grounds on its face, as amplified in the supporting affidavit of the Applicant.
2. To the effect that William Gatei Muiruri (hereafter the Respondent) filed a Party and Party Bill of Costs dated September 5, 2018 which was vigorously opposed and a ruling delivered on May 3, 2023; that being aggrieved with the said ruling, he proceeded to file a Notice of Objection pursuant to Paragraph 11 of the [ARO](#); and that the Respondent has proceeded to apply for warrants of attachment and sale of his movable property. He particularly takes issue with the decision of the taxing officer on grounds that she erred in fact and law; - in awarding the erroneous sum of Kshs. 100,000/- as Instruction Fees apparently under schedule 6A (1); in erroneously failing to tax the Bill of Costs in consistence with the relevant proceedings; in taxing items in the Bill of Cost, as drawn resulting in excessive sums; and in failing to consider the Applicant's submissions in opposition to the Bill of Costs.



3. The Applicant reiterated the Court's jurisdiction to review and or set aside the taxing officer's decision in the interest of justice. In conclusion he deposes that compelling him to make payment in respect of excessive taxed costs would be prejudicial in these tough economic times.
4. The Respondent opposes the motion by way of grounds of opposition dated 09.05.2024. He takes issue with the motion on grounds that it is time barred having been filed, without leave of the court , nine (9) months after the taxation ruling , therefore outside the fourteen (14) days provided under Paragraph 11 of the ARO; that the Applicant failed to inform the taxing master of the items in the bill it objected to but instead filed a notice of objection that is not provided for under the Order; that the application has been filed after inordinate delay which has not been explained; and that the application is frivolous, vexatious, unmerited, misconceived and an abuse of the Court process.
5. Directions were given for the parties to canvass the application by way of written submissions. Neither party filed their written submissions despite being accorded ample time to do so.
6. The Court has considered the material canvassed in respect of the motion. A review of the reliefs sought, and the provisions invoked in the Applicant's motion discloses that what is before the court is a reference in respect of taxing proceedings that culminated in the ruling delivered by the taxing officer on 30.05.2023. A preliminary issue raised by the Respondent is that the chamber summons is time barred. Therefore, it would be apposite to address the Respondent's objection before delving into the merits of the application.
7. The objection relates to limitation of time, hence jurisdiction and therefore qualifies as a preliminary objection. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* [1969] EA 696, Law J. A. stated that:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

8. Later, Ojwang J (as he then was) in the case of *Oraro v Mbaja* [2005] KLR 141, reiterated the foregoing by stating that: -

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and



it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

9. The Court of Appeal in *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR cited with approval the decision of the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR where at paragraph 16 the Supreme Court observed that; -

“(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (see *Hassan Nyanje Charo v Khatib Mwashetani & 3 others*, Civil Application No. 14 of 2014, [2014] eKLR).”

10. The Respondent’s objection is premised on Paragraph 11 of the *Advocates Remuneration Order*. The relevant facets of the provision, provide as follows:

“(1) (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) .....

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

11. The question of limitation of time goes to the root of the Court’s jurisdiction to entertain the proceedings before it, as no Court has jurisdiction to hear a matter that is time barred. See the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1. The Court of Appeal in *Thuranira Karauri v Agnes Nchebe* [1997] eKLR observed that: -

“We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit”.

12. In determining whether the reference is time barred, this Court must also determine when time began to run. From the record before the Court, it is not in dispute that the Respondent filed a Party and Party Bill of Costs dated 05.09.2018 (see the Applicant’s annexure marked JKC-1) which was eventually taxed by way of the ruling delivered on May 30, 2023 (see the Applicant’s annexure marked JKC-3).



- Pursuant to the ruling a certificate of taxed costs dated 09.06.2023, was issued. The Applicant being aggrieved by the outcome, lodged a Notice of Objection dated June 12, 2023, pursuant to paragraph 11 (1) of the *Advocates Remuneration Order*, to the decision on taxation.
13. Alongside the Notice, the Applicant wrote a letter of even date requesting for a typed copy of proceedings and a certified copy of the impugned ruling. The Case Tracking System (CTS) shows that the Respondent lodged an application for execution (see annexure marked JKC-3) on 26.06.2023, in respect of the taxed costs. It was however not until February 2024 that the Applicant moved this Court via the instant application.
  14. Evidently therefore, the time began to run upon delivery of the impugned taxation ruling on 30.05.2023. The Applicant seems to have complied with the requirements of Paragraph 11 (1) of the *Advocates Remuneration Order* by lodging his Notice of Objection to the ruling on taxation on 14.06.2023 within fourteen (14) days upon delivery of the taxation decision. However, notwithstanding the wording in first limb of Paragraph 11 (2) of the *Advocates Remuneration Order*, a perfunctory review of the impugned ruling that is the subject of the reference reveals that, the taxation ruling is substantive, complete and contains reasons for the taxing officers' decision on the taxed items.
  15. Thus, if he was thereby aggrieved, the Applicant ought to have, within fourteen (14) days, applied to this Court by way of a reference setting out his grounds. In the court's view, it was unnecessary, in the circumstances for the Applicant to request and or wait to receive written reasons from the taxing officer to enable him to lodge his reference, as the ruling by design provided the reasons for the taxing of the items in the Bill of Costs. If he was minded despite the elaborate ruling, to lodge the Notice of Objection as a matter of routine, the Applicant ought to have contemporaneously filed his reference to avert being caught up by limitation.
  16. The Applicant filed his reference before seeking enlargement of time, eschewed filing a further affidavit to explain the delay, and did not file submissions to persuade the Court why it ought to entertain the reference. All despite notice via Respondent's challenge that the reference could be time barred. The court takes note of the extended delay in bringing the reference; it is inordinate, unexplained and in the absence of an explanation, cannot be countenanced.
  17. It has become a routine practice that taxing officers deliver written taxation rulings containing their reasons for such taxation, therefore obviating the need for requests for such reasons and curbing delay. The court cannot encourage a practice as evident here, where a party who has full reasons for taxation at the delivery of the ruling routinely and superfluously seeks written reasons for taxation and waits to file the reference when it best suits him. The Bill of Costs in this case was taxed on 30.05.2023 and reasons given in the ruling, but it was not until February 21, 2024 that the present application was filed. For this kind of proceedings which are especially designed to simplify and expedite the resolution of disputes arising from advocates' charges and the ascertainment of costs, the delay is manifestly inordinate and cannot be countenanced in the absence of a reasonable explanation.
  18. Finally, while the Court is alive to the emphasis in *Visbva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR concerning the importance of the right of appeal, and a reference is by design a form of an appeal, the right is not absolute and must be balanced against the Respondent's corresponding right to have the dispute determined expeditiously. In the circumstances, the Court finds that the Applicant's reference is time barred and incompetent by dint of the provisions of paragraph 11 (2) of the *Advocates Remuneration Order*. Ergo, the Court has no jurisdiction to entertain it. The chamber summons dated February 21, 2024 is hereby struck out with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 27TH DAY OF JUNE 2024.**



**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicant: Mr. Kimani**

**For the Respondent: N/A**

**C/A: Erick**

